(23)

IN THE

Supreme Court

OF THE

United States

Office - Supreme Court, U. S.
FILED
JUL 14 1942
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1941

NO. 231

HAWAIIAN GAS PRODUCTS, LIMITED,
a corporation,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Ninth Circuit

and

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBBINS BATTELL ANDERSON,
Bank of Hawaii Building,
Honolulu, Hawaii,
Attorney for Petitioner.

HEATON LUSE WRENN,
of Counsel.

Subject Index

		Pages
Petition for writ of certiorari		1
I	Summary Statement of the Matter Involved	2
II	Reasons relied on for the allowance of the writ	5
Brief in support of petition for writ of certiorari		7
I	The Opinions of the Board and Court below	7
II	Jurisdiction	8
III	Statement of the Case	8
IV	Specification of Errors	9
V	Summary of Argument	9
	A Condemnation of Real Property is not a "sale" thereof within the meaning of the word as used in Section 117(d) of the Revenue Act of 1936	10
	Conclusion	19
Appendix		

Table of Cases Cited

PAGES

Bethany Presbyterian Church v. *City of Seattle*, 154 Wash. 529..... 13

Commissioner v. *Coggan*, 119 F. (2) 504..... 11

Duckett & Co. v. *United States*, 266 U. S. 149.....12-14

Electro-Chemical & Engraving Co. v. *Commissioner*, 311 U. S. 513.....3-11-12

Helvering v. *William Flaccus Oak Leather Co.*, 313 U. S. 247.....4-5-10-15-17-18-19

Helvering v. *Hammel*, 311 U. S. 504.....3-10-11-12

Matteis v. *United States*, 57 F. (2) 999 at 1001..... 11

Ratigan v. *United States*, 88 F. (2) 919 at 921..... 11

United States v. *San Francisco*, 23 F. Supp. 40..... 11

Table of Statutes Cited

	Pages
Internal Revenue Act of 1934, Sec. 112(f)	16-17-18-19
Internal Revenue Act of 1934, Sec. 115(c)	18
Internal Revenue Act of 1934, Sec. 117(d)	15-18
Internal Revenue Act of 1934, Sec. 117(e)	18
Internal Revenue Act of 1934, Sec. 117(f)	18
Internal Revenue Act of 1936, (49 Stat. 1648, 1659) Sec. 23(f)	4-8
Internal Revenue Act of 1936, Sec. 112(f)	15
Internal Revenue Act of 1936, Sec. 117	11-12-18
Internal Revenue Act of 1936, (49 Stat. 1692) Sec. 117(d)	3-4-8-9-10
Judicial Code, as amended by Act of Congress of Feb. 13, 1925, (U. S. Code, Title 28, Sec. 347) Sec. 240(a)	8
Revised Laws of Hawaii 1935, Secs. 50 to 70	13
Revised Laws of Hawaii 1935, Sec. 59	13-14
Revised Laws of Hawaii 1935, Sec. 66	13-14

Table of Treasury Regulations and Decisions Cited

Treasury Regulations No. 86, Art. 113(a) (9)-1	17
T. D. 4698, XV-2 Cum. Bull. 159	18

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No.

HAWAIIAN GAS PRODUCTS, LIMITED,
a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of HAWAIIAN GAS PRODUCTS, LIMITED, a Hawaiian corporation (hereinafter sometimes called the Petitioner) for a Writ of Certiorari to

the United States Circuit Court of Appeals for the Ninth Circuit, respectfully shows as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This case involves the determination of Petitioner's income tax for the calendar year 1937. The facts of the case were stipulated (Record pp. 15-18) and may be briefly recapitulated as follows:

In 1933 the Petitioner, having its principal place of business in Honolulu, Territory of Hawaii, acquired certain real estate in the Territory of Hawaii which had an adjusted cost basis in its hands in 1937 of $44,979.48. November 2, 1937 the Territory of Hawaii filed an action in the Territorial Courts to condemn, in eminent domain proceedings, among other parcels of land, the above mentioned real estate belonging to Petitioner. The Petitioner filed an answer in that action alleging that it did not wish to sell the property in question but recognized the power and capacity of the Territory of Hawaii to take the real estate under eminent domain. Judgment of condemnation was entered December 1, 1937, which ordered the real estate condemned and payment of damages to Petitioner in the sum of $32,500., which sum represented the value of the land as of the date of condemnation. The said sum was paid to, and received by Petitioner in 1937. The transaction resulted in a loss to Petitioner in said year in the amount of $12,479.48.

The Respondent determined a deficiency in income tax of Petitioner for 1937 in the amount of $5,903.56 upon the theory that the loss in question was a capital loss and therefore subject to the limitations of Section 117(d) of the Revenue Act of 1936. (Appendix p. 1)

Petitioner duly perfected an appeal from this determination to the United States Board of Tax Appeals. The United States Board of Tax Appeals affirmed the determination of the respondent by its decision entered February 18, 1941 (Record pp. 22-23). The Board, in its opinion, reached this conclusion upon the ground that "there is no substantial difference between a loss sustained upon the foreclosure sale of mortgaged property and a loss sustained as a result of a condemnation and taking of property by the Territory of Hawaii" (Record p. 22). Having found that there was no substantial difference between the two types of loss the Board relied upon the opinions of this Court in the cases of *Helvering* v. *Hammel,* 311 U. S. 504, and *Electro-Chemical & Engraving Co.* v. *Commissioner,* 311 U. S. 513, both of which cases held that losses sustained on mortgage foreclosures were capital losses.

Petitioner duly perfected its appeal from the decision of the United States Board of Tax Appeals to the United States Circuit Court of Appeals for the Ninth Circuit. That court, on February 20, 1942, entered its judgment affirming the said decision of the United States Board of Tax Appeals (Record pp. 40-51). The United States Circuit Court of Appeals for the Ninth Circuit in its

opinion (Record pp. 36-40) held that an eminent domain proceeding amounted to a "sale" within the intendment of Section 117(d) of the Revenue Act of 1936. In said opinion no mention was made or consideration given to the case of *Helvering* v. *William Flaccus Oak Leather Co.*, 313 U. S. 247, which case it had been urged by the petitioner, required a reversal of the decision of the United States Board of Tax Appeals.

This case requires the determination of whether said loss may be deducted by Petitioner in full as an ordinary business loss under Section 23(f) of the Revenue Act of 1936 (Appendix p. 1) or whether said loss was a capital loss and thus subject to the limitations provided in Section 117(d) of said Revenue Act. If said loss was a capital loss only $2,000. of said loss may be deducted. If the said condemnation did not constitute a "sale or exchange" within the meaning of those words as used in Section 117(d) of the Revenue Act of 1936 then the loss is an ordinary business loss and may be deducted in full. On the other hand, if such condemnation did constitute a "sale or exchange" within the meaning of those words the loss was a capital loss and subject to the limitations provided in said Section 117(d) of said Act.

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The United States Circuit Court of Appeals for the Ninth Circuit in this case has decided an important question of Federal law which has not been but should be settled by this Court.

2. The United States Circuit Court of Appeals for the Ninth Circuit in this case has decided an important question of Federal law in a manner which is untenable.

3. The United States Circuit Court of Appeals for the Ninth Circuit in this case decided a Federal question in a way probably in conflict with *Helvering* v. *William Flaccus Oak Leather Co.*, 313 U. S. 247.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 9833, *Hawaiian Gas Products, Limited, a corporation, Petitioner* v. *Commissioner of Internal Revenue, Respondent*, and that the judgment of the said United States Circuit Court of Appeals for the Ninth Circuit

may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

DATED: Honolulu, Territory of Hawaii, June 16, 1942.

Respectfully submitted,

HAWAIIAN GAS PRODUCTS, LIMITED,
a corporation,

By—ROBBINS BATTELL ANDERSON,
Attorney for Petitioner

HEATON LUSE WRENN,
of Counsel.